United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 30, 1997

TO : William C. Schaub, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Detroit News
Cases 7-CA-39377, -39523,
-39548, -39549, -39550, -39594

524-5073-3300
524-5079-4283
524-8351-6200
625-3350-1101-5000
625-3350-1133-2550

These cases were submitted for advice as to whether the Employer violated Sections 8(a)(1) and (3) by discharging, for alleged blocking of ingress and egress, certain employees who participated in strike activities. More specifically, advice was sought as to the proper test for determining when conduct alleged as blocking of ingress and egress constitutes serious misconduct for which a striking employee may be lawfully discharged.[1]

ACTION

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[1] Advice was also sought as to whether the balancing test set out in NLRB v. Thayer Co., 213 F.2d 748 (1st Cir. 1954), which has been applied to unfair labor practice strikers who engaged in misconduct, may still be relied upon after the Board's decision in Clear Pine Mouldings, Inc., 268 NLRB 1044 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). Since Clear Pine Mouldings it has been the position of the Office of the General Counsel that the Thayer balancing test remains viable (see A.T. Massey Coal Co., Inc., Case 9-CA-23240, Advice Memorandum dated December 9, 1987). Thus, Thayer balancing would be appropriate in cases of lawful discharges for striker misconduct. Since we conclude that the employees in these cases did not engage in serious misconduct warranting discharge we do not apply the Thayer balancing test. [*FOIA Exemption 5*

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We conclude that the employees in these cases did not engage in serious picket line misconduct and that the discharges were thus unlawful.

An employer may lawfully discharge or deny reinstatement to a striker who has engaged in serious picket line misconduct.[2] However, not every impropriety or act of misconduct will deprive a striker of the Act's protections.[3] In order to determine when striker misconduct is sufficiently serious to justify discharge or a denial of reinstatement, the Board in Clear Pine Mouldings adopted an objective test: "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[4]

Clear Pine Mouldings also states[5] that under the Act, strikers have a right only to engage in "peaceful patrolling" and the "nonthreatening expression of opinion." It lists the blocking of access to the employer's premises as one of types of conduct that is not protected by the Act.

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[2] Clear Pine Mouldings, Inc., 268 NLRB 1044. See, e.g., Tube Craft, Inc., 287 NLRB 491 (1987) and M.P.C. Plating Inc., 295 NLRB 583 (1989) (pattern of conduct evidencing a strategy of blocking); Aztec Bus Lines, 289 NLRB 1021 (1988)(assaults); PRC Recording Co., 280 NLRB 615 (1986), enfd. 836 F.2d 289 (7th Cir. 1987) (throwing nails on driveway, assault on vehicle); International Paper Co., 309 NLRB 31 (1992), enfd. 4 F.3d 982 (1st Cir. 1993)(threatening bodily injury while blocking).

[3] Clear Pine Mouldings, 268 NLRB at 1045 (citing Coronet Casuals, 207 NLRB 304, 305 (1973)); M.P.C. Plating, Inc., 295 NLRB at 596; Calliope Designs, 297 NLRB 510, 519 (1989).

[4] 268 NLRB at 1046, adopting the test enunciated by the Third Circuit in NLRB v. McQuaide, Inc., 552 F.2d 519 (3rd Cir. 1977).

[5] 268 NLRB at 1047.

Despite this language, Clear Pine Mouldings does not establish that any type of blocking is *per se* serious misconduct that justifies discharge. Subsequent Board and court cases so recognize.[6] Clear Pine Mouldings does not establish a *per se* rule regarding blocking because the statements regarding blocking constitute a part of the plurality opinion in which two of the Board members did not join.[7] In the absence of a *per se* rule, whether particular instances of blocking and other conduct meet the Clear Pine misconduct test "must be determined by evaluating the factual circumstances on a case-by-case basis."[8]

Cases that have applied the Clear Pine test are consistent with this approach and show that not all types and instances of blocking constitute serious misconduct. These cases have evaluated allegations of blocking by weighing a number of factors, such as whether access was actually and effectively prevented; whether the blocking was momentary or extended, isolated or repeated; and whether it was done peacefully or in a confrontational and intimidating manner. In several instances, the Board has found that the strikers engaged in blocking were not engaged in serious misconduct and were unlawfully discharged or denied reinstatement.

For example, in Roto Rooter,[9] the Board agreed with the Administrative Law Judge's finding that an incident during which a striker parked his truck across the employer's driveway did not warrant denial of reinstatement. The ALJ noted that an adjacent driveway regularly used by the

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[6] See, e.g., Ornamental Iron Work Co., 295 NLRB 473, 479 (1989), enfd. mem. 935 F.2d 270 (6th Cir. 1991); Cal Spas, 322 NLRB No. 10, slip op. at p.22 (August 27, 1996); M.P.C. Plating, Inc. v. NLRB, 953 F.2d 1018, 1022 (6th Cir. 1992).

[7] 268 NLRB at 1049 ("Although we join Chairman Dotson and Member Hunter in adopting the *McQuaide* test, we do not adopt their reasoning in part I, C, including their analysis of the right to strike...").

[8] Massachusetts Coastal Seafoods, 293 NLRB 496, 530 (1989).

[9] 283 NLRB 771, 771-772 (1987).

employer remained accessible at all times and that the striker promptly removed the truck when he was requested to do so. The Board concluded that under those circumstances there was no evidence of any actual significant interference to the employer's business resulting from the striker's conduct.[10]

Additionally, in Hotel Roanoke,[11] the Board adopted the ALJ's finding that an employee was unlawfully denied reinstatement for her participation in picketing that obstructed traffic. The employee (Betty Shockley) patrolled slowly in front of the entrance to the employer's parking lot and occasionally stopped in the driveway. As a result, traffic was delayed and the police were called to intervene. The ALJ noted that there was no evidence as to the extent to which traffic was actually blocked or inconvenienced, but that nonetheless, causing some disruption of the flow of traffic did not constitute serious misconduct: "Disruptions of ingress and egress of vehicles is often associated with picketing and is the type of thing to be expected. When a strike occurs, there necessarily and commonly will be some disruptions. The question is whether the acts of disruption are so serious as to deny one continued employment, which is very serious indeed."[12]

Likewise, the blocking in Ornamental Iron Work Co.[13] did not constitute serious misconduct under the Clear Pine test. In that case, four strikers were discharged for an incident in which two of them stood in front of a truck and two stood adjacent to it, as it attempted to enter the employer's premises. As the strikers blocked the gate, they informed the truck driver that they were on strike and

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[10] The Board found that other conduct by the same striker (making threats of bodily injury) did constitute lawful grounds for denying reinstatement. 283 NLRB at 772.

[11] 293 NLRB 182 (1989).

[12] 293 NLRB at 217 (see discussion regarding Betty Shockley).

[13] 295 NLRB 473 (1989).

asked him to honor the picket line. The truck driver, who had been informed that the police had already been called to facilitate his passage, pulled back from the gate and waited for the police. Once the police arrived, the strikers moved aside and allowed the truck to pass. The ALJ, affirmed by the Board, rejected the interpretation of Clear Pine Mouldings as establishing that any type of blocking is unprotected. Instead, he concluded that "a momentary, otherwise noncoercive blockage will fall within that form of mischief classified as 'minor acts of misconduct [which] must have been in the contemplation of Congress when it provided for right to strike'."[14] With respect to the blocking incident in question, he found that there was no evidence of physical obstruction on a prolonged basis, and that "the instantaneous blockage on the part [of the strikers] was solely to gain the attention of the driver in order for them peacefully to deliver their message, and hence represented conduct for which they could not be discharged."[15]

Domsey Trading Corp.,[16] also examines an allegation of blocking under the Clear Pine test. There, the employer denied reinstatement to a striker on the grounds that she had, on a couple of occasions, stepped away from the picket line and onto the entranceway and had to be removed by the police on both occasions. The ALJ, affirmed by the Board, discredited the employer's witnesses, but stated that if the striker had occupied the entranceway on a couple of occasions, as alleged, she "blocked nothing but at most created some very minor interference, which was not of the level of misconduct intended to be encompassed by Clear Pine."[17]

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[14] Id. at 479.

[15] Id. at 480.

[16] 310 NLRB 777 (1993), enfd. 16 F.3d 517 (2nd Cir. 1994).

[17] Id. at 809 (see discussion on Yolande Hertelou).

More recently, in Cal Spas,[18] the Board concluded that under Clear Pine and its progeny, one isolated incident of blocking during a strike does not constitute grounds for denying reinstatement. In that case, the strikers denied reinstatement had been videotaped standing in front of cars and impeding their access to the employer's premises. Although there was evidence that on other dates, picketers had blocked access to delivery trucks, the strikers in question had only been identified as directly participating in the blocking on one date. The Board found that in the absence of evidence of repeated or prolonged incidents showing a pattern of blocking attributable to the strikers in question, the strikers could not be denied reinstatement.

On the other hand, cases in which the blocking did constitute serious misconduct under Clear Pine presented a variety of factors that aggravated the strikers' conduct. For example, the blocking was unprotected when a striker directly "body blocked" and yelled insults at an individual who attempted to move around him, and when employees formed a human wall, chanting "we shall not be moved," preventing several nonstrikers from passing through until the police intervened.[19] Repeated or extended episodes showing a strategy or pattern of blocking by particular strikers is also unprotected.[20] Likewise, actively blocking for a

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[18] 322 NLRB No. 10, slip op. at p.22.

[19] Newport News Shipbuilding & Dry Dock v. NLRB, 738 F.2d 1404, 1410-1411 (4th Cir. 1984).

[20] See, e.g., Tube Craft, 287 NLRB AT 493 (All the discharged strikers directly participated in more than one episode of blocking. Some of the episodes of blocking extended for a substantial period of time, as the vehicles attempting entry were detained for approximately one hour. Although one of the strikers participated in only one of these prolonged incidents, he did actively participate in another incident in which he faced an approaching truck whose driver opted not to attempt entry until the police arrived.); M.P.C. Plating, Inc., 295 NLRB at 596 (All of the discharged strikers were identified as actively participating in blocking on repeated occasions, and many

substantial period of time and refusing to move at the request of the police, while shouting that they would not move made the strikers' conduct unprotected.[21] Similarly, blocking by surrounding a vehicle and shouting threats at the driver also constitutes serious misconduct.[22]

Consequently, post-Clear Pine case law shows that blocking of ingress and egress is not *per se* grounds for discharge. Rather, incidents of blocking may or may not constitute serious misconduct warranting discharge, depending on the factual circumstances. Thus, the Board weighs a variety of factors when applying the Clear Pine test. As the cases reviewed above illustrate, factors that determine whether the conduct rises to the level of the Clear Pine standard are, for example, whether access was actually prevented, or there was only some interference with ingress or egress; whether the blocking was momentary, or of extended duration; whether the discharge was based on an isolated instance of blocking, or on repeated blocking by the same employee; whether the striker moved aside voluntarily or persistently refused requests to allow access; and in what manner the blocking was carried out (whether it was done in a peaceful manner, or in a confrontational, intimidating style).

Applying these principles, we conclude that none of the discharges submitted in the instant cases were based on

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also engaged in pushing, making threats, and throwing objects. Strikers occasionally joined arms to form a human chain, picketed at all entrances, and so effectively and completely blocked access to the employer's facility that, on two successive dates, production was halted.)

[21] Big Horn Coal Co., 309 NLRB 255 (1992) (The strikers actively blocked a company convoy for about two hours, and when access was finally secured for some delivery trucks, shouted "next time we'll weld the gate shut." Only those strikers who were directly involved in the blocking, as opposed to standing by the side of the gate or just momentarily occupying the driveway, were refused reinstatement).

[22] International Paper Co., 309 NLRB at 31.

serious striker misconduct, under Clear Pine. Thus, the discharges were in violation of Sections 8(a)(1) and (3).[23]

Discharges based on the August 30, 1996 rally:

Several strikers were discharged for blocking ingress and egress during a rally held by the striking unions in front of a Detroit News facility on August 30, 1996.[24] The evidence shows that the picketing was conducted in a peaceful manner and that there was no actual blocking of access. Rather, a videotape of the event shows that early during the rally, picketers were grouped mostly on the sidewalk in front of the Detroit News building. There were no strikers standing directly in front of the automatic door and the passageway in front of the door, bordered by a railing, was open and unobstructed. The videotape shows a man, early during the rally, exiting the building through the automatic door and freely walking along the pathway and out of the video frame. Strikers who were near the door leaning on the railing made no attempt to interfere with the man's egress.

The evidence also shows that shortly after the rally started, the Employer disabled the automatic door by placing visible wooden bars across the automatic entranceway. Although people could not actually enter or exit through that door, there is evidence that strikers

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[23] It should be noted that several of the strikers have been "discharged" more than once for various incidents. Inasmuch as the Employer has relied on each incident as separate and distinct grounds for discharge, we have examined each incident in isolation. However, for those strikers who have been "discharged" more than once, it would be more appropriate to consider any subsequent incidents as matters that may affect reinstatement during compliance proceedings.

[24] Two of the strikers, Allan Lengel and Robert Ourlian, had already been discharged for prior alleged misconduct. They were also "discharged" for their participation in an October 16, 1996 incident. The Region has decided to issue complaint on their original discharges, and has determined that the October 16 incident did not constitute grounds for discharge. We have not examined these discharges.

were not blocking access to it, since several people approached the locked door during the rally.[25] In addition, all throughout the rally, visitors and nonstrikers were using other entrances to the building without any interference from strikers.

Although some strikers eventually stood in front of the automatic door and sat on the steps leading to it or on the nearby sidewalk, they did not do so until some time after the Employer had disabled the door. The strikers occupied the space in front of the door only after they knew that access to the building was not possible through that door.[26] The sit-down in front of the door lasted approximately 20 to 30 minutes, of a 2 hour rally.

In sum, there is no evidence that any striker engaged in misconduct during the August 30 rally. Although there was a large congregation of people in front the Detroit News facility, there is no evidence that any individual attempting ingress or egress through the front door was prevented from doing so. Understandably, the majority of people chose to avoid possible confrontation and used alternate entrances to the building. There is no evidence that in doing so, they encountered any interference by strikers. The Employer also sought to avoid any possible confrontations by disabling the front door and forcing people to use other entrances. However, that was the Employer's choice and there is no evidence that the strikers' conduct was such that forced the Employer to lock that door. On the contrary, before the Employer disabled

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[25] One of the strikers saw a man walk up to front door who was motioned by people inside the lobby to use one of the side entrances to the building. One of the Employer's security guards, in a statement provided to the Region by the Employer, stated that about five people walked up to the front door during the rally.

[26] Cf. Big Horn Coal, 309 NLRB at p.259 (discussion regarding M.O. Worthington). The ALJ found that one striker had not parked his truck across an alternate entrance, but noted that even if he had, a claim of blocking would be doubtful because the landowner had locked that gate and entry was not possible through it.

the door, it was accessible and used by at least one person.

None of the submitted discharges based on the August 30 incident allege any specific striker misconduct other than generally blocking ingress and egress during the rally. Since we conclude that there was no blocking, none of the submitted discharges resulting from the rally were based on serious striker misconduct, under Clear Pine. [27] Thus, all submitted discharges based on this incident, including those of people who were arrested,[28] are unlawful.

Discharge of Shawn Ellis for the August 29, 1996 picketing:

The charge involving Shawn Ellis, Case 7-CA-39594, relates to his original discharge for participation in picketing on August 29, 1996, in addition to his subsequent "discharge" for the August 30 rally.

The picketing on August 29 took place at a Detroit News distribution facility. There is evidence that a concrete barrier was placed in the driveway leading to the parking lot, partially blocking the parking lot entrance. There is also evidence that the strikers patrolled across the driveway, around the concrete barrier, obstructing traffic. Some strikers stopped a truck from exiting in an attempt to hand the driver a piece of paper. However, there is also evidence that the police were present, coordinating the passage of vehicles in and out of the parking lot. Although vehicles were momentarily detained, strikers allowed vehicles to pass according to police instructions.

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[27] The discharges we examined were those of Allan Lengel, Robert Ourlian, Shawn Ellis, Alex Young, Melanie Francis, Richard Torres, Ann Znamer, Sam Attard, Gary Rusnell, Pat Coffey, Judith McCoy, and Jack Howe. Our analysis and conclusion does not apply to any discharges that may have resulted from the rally if they were based on misconduct other than the blocking of ingress and egress.

[28] The fact that a striker is arrested or convicted under state law is not dispositive of whether the striker's conduct is cause for discharge. See, e.g., Catalytic, Inc., 275 NLRB 97, 98 fn.13 (1985).

Concededly, according to the evidence before us, the picketing of August 29 may be said to be in violation of the unions' formal settlement agreement not to block ingress or egress. However, there is no evidence of any specific misconduct by Ellis in particular. The Employer based Ellis's discharge generally on his presence and participation during the August 29 event. Ellis, however did not participate in the placement of the concrete barrier in the driveway, nor in the stopping of the truck that was attempting egress. The evidence before us does not describe the exact nature and extent of Ellis's participation. There is no evidence other than that he was among the group of strikers who by intervals occupied the driveway and by intervals stood aside to let vehicles pass. The Employer's original discharge of Ellis relies only on the picketing of August 29, and not on any prior pattern of misconduct by Ellis. Inasmuch as passage was delayed but not actually prevented, the strikers were cooperating with police, and the Employer did not rely on any additional misconduct by Ellis, we conclude that his participation in the August 29 picketing is comparable to that of the strikers in Hotel Roanake,[29] Ornamental Iron Work Co.,[30] and Cal Spas,[31] and thus, did not constitute serious misconduct warranting discharge.

The fact that the picketing of that day may, as a whole, be considered a violation of the unions' Settlement

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[29] 293 NLRB at 217 (striker who patrolled slowly in front of entrance and occasionally stopped in driveway, causing disruption in the flow of traffic, not engaged in serious misconduct).

[30] 295 NLRB at 480 (strikers who stood in front of vehicle in an attempt to peacefully deliver message to driver, but allowed passage when so instructed by police did not engage in serious misconduct).

[31] 322 NLRB No. 10, slip op. at p.22 (although there was blocking of ingress and egress on more than one date during the strike, strikers who were identified as directly participating in the blocking on only one of those instances could not be denied reinstatement).

Stipulation concerning the prior CB charges is not determinative of Ellis's or any other striker's discharge. The unions' responsibility for picketing that may have exceeded lawful bounds does not, without more, establish that a particular striker engaged in serious misconduct warranting discharge.[32] We conclude, therefore, that Ellis did not engage in serious misconduct on August 29 and that his discharge violated Sections 8(a)(3) and (1) of the Act.

In conclusion, none of the strikers discharged in the above cases engaged in serious misconduct under the Clear Pine standard. Consequently, their discharges violated Sections 8(a)(3) and (1) of the Act.

B.J.K.

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[32] Cf. NLRB v. Cambria Clay Products, Co., 215 F.2d 48, 54 (6th Cir. 1954)(with respect to alleged violations of an injunction against picket violence: "It is not the fact that there was a violation of the injunction that determines whether [the strikers] should or should not be reinstated, but the type of conduct they engaged in, and the manner and nature and seriousness of their violation of the order."), cited with approval in NLRB v. McQuaide, Inc., 552 F.2d at 526